Nos. 04-1034 and 04-1384

In The
Supreme Court of the United States

JOHN A. RAPANOS, JUDITH A. NELKIE RAPANOS, PRODO, INC., ROLLING MEADOWS HUNT CLUB, and PINE RIVER BLUFFS ESTATES, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JUNE CARABELL, KEITH CARABELL, HARVEY GORDENKER, and FRANCES GORDENKER,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

AMICUS CURIAE BRIEF ON THE MERITS OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Clean Water Act prohibition on unpermitted discharges to "navigable waters" extends to nonnavigable, intrastate wetlands that do not abut a navigable water?

2. Whether extension of the Clean Water Act jurisdiction to every nonnavigable, intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceeds Congress's constitutional power to regulate commerce among the States?

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AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION

Mountain States Legal Foundation ("MSLF") respectfully submits this *amicus curiae* brief on behalf of itself in support of Petitioners. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all parties.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

MSLF is a non-profit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every State of the country. A large number of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are involved actively in many environmental issues. Moreover, MSLF and its members have an interest in ensuring that federal laws and regulations, including the Clean Water Act, are implemented and enforced in a manner consistent with the Constitution of the United States.

[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), MSLF represents that no counsel for any party authored this brief in whole, or in part, and that no person or entity, other than MSLF, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The federal government's imposition of jurisdiction purportedly in accordance with the Clean Water Act may not extend to nonnavigable, intrastate wetlands that do not abut navigable waters. Further, extension of jurisdiction to every nonnavigable, intrastate wetland with even the most tenuous or remote of hydrological connections exceeds Congress's constitutional powers to regulate commerce among the States. One of a State's traditional roles includes the right to regulate land use within the State.

Historically, States have employed their authority over land use to regulate uses that would affect wetlands. In fact, long before enactment of the Clean Water Act, many States had passed laws to regulate land use in wetland areas. Indeed, despite the encroachment on States' traditional roles by the federal government, States continue to regulate wetlands. As a result, the removal of the unconstitutional imposition of federal jurisdiction over nonnavigable, intrastate wetlands would result in little, if any, gap in wetland protection, as States resume primary enforcement of land use.

Moreover, given this Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), the federal government's inclusion of nonnavigable, intrastate wetlands within the definition of "waters of the United States" is unreasonable and not entitled deference. To extend jurisdiction to these wetlands exceeds Congress's authority under the Commerce Clause, and therefore

cannot be a reasonable interpretation of the Clean Water Act's definition of "waters of the United States."

ARGUMENT

Petitioners are accused of filling wetlands on their properties without a federal permit in purported violation of section 404 of the Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), 33 U.S.C. § 1344. The properties at issue entail nonnavigable, intrastate wetlands that do not abut navigable waters, but instead are separated, by distances ranging from approximately one mile to as far as 20 miles, from the nearest navigable water. Despite that these remote wetlands are not adjacent to waters of the United States and have only an attenuated, if any, connection to navigable waters, the federal government has asserted jurisdiction over Petitioners' properties under section 404 of the CWA.

To the detriment of private landowners and in conflict with the authority of the States to regulate lands within their borders, the federal government has employed an expansive interpretation of its jurisdiction over "waters of the United States."[2] The federal government now interprets

[2] On its face, CWA section 404 requires landowners to obtain a permit from the United States Army Corps of Engineers in order to discharge dredged or fill material into "navigable waters." 33 U.S.C. § 1344(a). "Navigable waters" has been defined by Congress as "waters of the United States, including the territorial seas." *Id.* § 1362(7). In regulation, the Corps of Engineers has defined "waters of the United States" to include waters that are navigable in fact, waters subject to tidal forces, all interstate waters including interstate wetlands, and *all other waters "such as intrastate . . . wetlands . . . the use, degradation or destruction of which could affect interstate or foreign commerce."*

(Continued on following page)

its jurisdictional authority under the CWA to include "adjacent waters" of "wetlands" where the only nexus between the "wetlands" and navigable waters is the mere presence of some purported "hydrological connection." *United States v. Rapanos*, 376 F.3d 629, 639 (6th Cir. 2004). Such an expansive interpretation of the CWA has never been sustained by this Court and was soundly rejected in *SWANCC*. 531 U.S. 159 (2001). Moreover, the federal government's interpretation of its jurisdictional authority under the CWA raises serious constitutional questions and creates a distinct conflict among the Courts of Appeals and confusion among administrative agencies. *See In re Needham*, 354 F.3d 340 (5th Cir. 2003) (reading *SWANCC* broadly to limit the CWA to navigable and non-navigable waters that directly abut navigable waters); *FD & P Enters., Inc. v. United States Army Corps of Eng'rs*, 239 F.Supp.2d 509 (D.N.J. 2003) (same); *but see Rapanos*, 376 F.3d 629 (6th Cir. 2004) (interpreting *SWANCC* narrowly to hold that the CWA reaches inland waters that purportedly share a hydrological connection with navigable waters); *Treacy v. Newdunn Assocs., LLP*, 344 F.3d 407 (4th Cir. 2003) (same); *United States v. Rueth Dev. Co.*, 334 F.3d 598 (7th Cir. 2003) (same); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001) (same).

One of the most fundamental principles of America's system of government is the protection of "historic spheres of state sovereignty from excessive federal encroachment." *Gonzales v. Raich*, ___ U.S. ___, 125 S.Ct. 2195, 2220

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33 C.F.R. § 328.3(1)(a) (emphasis added); *see also* 40 C.F.R. § 122.2 (providing the Environmental Protection Agency's definition of "waters of the United States," which is substantially identical to 33 C.F.R. § 328.3(1)(a)).

(2005) (O'Connor, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 557 (1995); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937). It is well established that the core police powers of the States always have included the authority to protect the health, safety, and welfare of their citizens. *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993); *Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977). Included within the basic, fundamental functions of State and local governments is the power to regulate land use planning and zoning. *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982) ("regulation of land use is perhaps the quintessential state activity"); *see SWANCC*, 531 U.S. at 174 (recognizing the "States' traditional and primary power over land and water use"); 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water . . . ."). However, when a federal regulation infringes on traditional State functions, that regulation is inherently suspect, as Chief Justice Marshall noted:

> Where rights are infringed, where fundamental principles are overthrown, where the general system of laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects.

United States v. Fisher, 6 U.S. (2 Cranch) 358, 390 (1805).

In its brief, *Amicus* MSLF will demonstrate that not only has regulation of wetlands historically been a function of State and local governments, but also such regulation continues to be exercised by State and local governments, despite the encroachment of federal regulation upon their sovereign functions. Further, although

administrative agencies are given deference in interpreting the statutes in their charge, *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-845 (1984), the agency's interpretation must not be "arbitrary, unreasonable, or manifestly contrary to the statute." *Id.* at 843-844. The authority Congress grants the agency to interpret its statutes cannot exceed in scope the powers granted Congress by the Constitution. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819). Because the federal government's interpretation of the CWA, extending jurisdiction to wetlands with the slimmest of purported "hydrological connections" to navigable waters, is an impermissible reading of the CWA, and because federal jurisdiction over such waters exceeds Congress's constitutional powers, this Court should reverse the decisions of the Sixth Circuit Court of Appeals and hold that the CWA does not reach these nonnavigable, intrastate wetlands.

I. STATES HISTORICALLY HAVE REGULATED, AND CONTINUE TO REGULATE, WETLANDS DESPITE FEDERAL ENCROACHMENT UPON STATE SOVEREIGN POWERS.

The 1969 Cuyahoga River fire, in part, led to the enactment of the Clean Water Act. *See, e.g.*, Drew Caputo, *A Job Half Finished: The Clean Water Act after 25 Years*, 27 Envtl. L. Rep. 10574, 10576 (1997). However, long before that fire, throughout the 1950s and 1960s, State and local governments had recognized the importance of environmental quality and had adopted first generation environmental controls. Jonathan H. Adler, *The Fable of Federal Environmental Regulation: Reconsidering the Federal Role in Environmental Protection*, 55 Case W. Res. L. Rev. 93, 95 (2004); N. William Hines, *Nor Any Drop to*

Drink: Public Regulation of Water Quality, 52 Iowa L. Rev. 186, 234 (1966); William L. Andreen, *The Evolution of Water Pollution Control in the United States–State, Local, and Federal Efforts, 1789-1972: Part I*, 22 Stan. Envtl. L.J. 145, 191 (2003). "The regulation of wetlands, particularly when nonpolluting activities are involved, entail the regulation of a myriad of ordinary land uses, from building homes to filling ditches, and so on. . . . As such, the regulation of wetlands is a traditional state function, much like zoning. Thus, it should be no surprise that literally thousands of local governments regulate the use and modification of wetlands." Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtl. L. 1, 36 (1999); Jon A. Kusler, *Federal, State, and Local Government Roles and Partnerships for Fair, Flexible, and Effective Wetland Regulation* 1 (Ass'n of State Wetland Managers 1994).

In fact, years before the United States District Court for the District of Columbia "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution," *Natural Res. Def. Council v. Callaway*, 392 F.Supp. 685, 686 (D.D.C. 1975), in 1963, Massachusetts had enacted the Nation's first statute requiring a State permit before filling or dredging coastal wetlands. Cymie Payne, *Local Regulation of Natural Resources: Efficiency, Effectiveness, and Fairness of Wetlands Permitting in Massachusetts*, 28 Envtl. L. 519, 534 (1998). In 1965, inland wetlands were afforded protections under the State permit system, and, in 1972, regulations to protect floodplains were added. *Id.*; Mass. Gen. Laws ch. 131, § 40 (2004). By 1972, when Congress enacted the CWA, other States, including Connecticut,

Georgia, and Washington were enacting wetland protection statutes. Adler, *supra*, 29 Envtl. L. at 48. "Although Massachusetts was the first state to enact an explicit wetlands protection statute, many localities had already done so. The Massachusetts law was itself based on a number of local zoning permit requirements already to be found in coastal states." *Id.* (internal quotation omitted).

By 1975, when *Callaway* was decided, every coastal State, except Texas, had adopted coastal wetland protections of some kind, and eleven States had enacted statutes protecting freshwater wetlands as well. *Id.*; Jon A. Kusler, *State Wetland Regulation: Status and Emerging Trends* 1 (Ass'n of State Wetland Managers 1994). More importantly, fourteen of the fifteen States that have ten percent or more of their landmass covered by wetlands had enacted their first wetland protection laws by 1975. Adler, *supra*, 29 Envtl. L. at 49 ("Moreover, most of these states have some form of protections [sic] for both inland and coastal wetlands."). It was not until 1977 that Congress codified the *Callaway* decision expanding federal jurisdiction, and, even then, Congress stopped short of explicitly authorizing federal regulation of wetlands. Clean Water Act of 1977, Pub. L. 95-217 (1977) (codified as amended at scattered sections of 33 U.S.C.).

While many States had yet to enact wetland conservation statues before 1975, that fact alone is unpersuasive. "The mere existence of a federal regulatory program likely provides states with a substantial incentive not to regulate themselves. Once a federal program is in place, states are likely to devote their resources to other priorities, rather than duplicate the federal efforts." Jonathan H. Adler, *Swamp Rules: The End of Federal Wetland Regulation?* 22 Reg. 11, 14 (1999).

Despite the incentive not to act, many States enacted wetland conservation programs to supplement or augment federal efforts, or to protect wetlands beyond the reach of the federal government but well within the State and local government's authority regarding land use. Fifteen States have regulatory statutes protecting freshwater wetlands. In addition, other States protect wetlands through various programs and regulatory schemes, including shoreline or coastal zone protection programs. Adler, *supra*, 29 Envtl. L. at 50. Several States have even gone so far as to assume authority to enforce CWA section 404 permitting from the Corps of Engineers. Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 Md. L. Rev. 1242, 1261-1288 (1995). Other States have assumed authority over the regulation of isolated wetlands following this Court's decision in *SWANCC* through their CWA section 401 water quality certification programs. C. Victor Pyle, III, Note, *Isolated Wetlands Jurisprudence Post-SWANCC and Resulting Federal and State Attempts to Fill the Void*, 11 Southeastern Envtl. L.J. 91, 101-108 (2002). There is no reason to believe that States will discontinue their wetland programs if federal enforcement were not present; indeed, that States have continued to regulate wetlands, in the face of federal regulation, point to States' willingness and capability to enforce their own wetland conservation programs.

II. REMOVING FEDERAL REGULATION WILL NOT RESULT IN A SIGNIFICANT GAP IN WETLAND REGULATION.

The conventional wisdom holds that federal regulation is necessary because State efforts and nonregulatory initiatives are ineffective in safeguarding environmental values, resulting in a "race to the bottom." Adler, *supra*, 22 Reg. at 12. However, "[t]he history of wetland conservation efforts suggests that states were hardly the environmental laggards that many suppose." *Id.* at 12. As illustrated above, not only did many States begin to protect wetlands before the federal government, States continue to develop new approaches to wetland conservation. Additionally, there are substantial nonregulatory conservation efforts that show great promise in preventing the destruction of wetlands on private property. After all, more than seven percent of nonfederal land in the 48 contiguous States, nearly 111 million acres, is covered by wetlands, mostly in the eastern United States. Natural Resources Conservation Service, *National Resources Inventory – 2002 Annual NRI* (2004).

Where State regulatory programs have been established, they generally have slowed wetland destruction. Adler, *supra*, 29 Envtl. L. at 51. For example, since 1972 when Virginia enacted its first wetland protection statute, "documented alteration of [Virginia's] wetlands dropped dramatically . . . from over 500 to less than 20 acres per year." *Id.* Likewise, Maryland has reduced its annual wetland losses and has prevented far more wetland destruction than would have occurred under the CWA alone. *Id.* In fact, many States impose broader restrictions than the Corps of Engineers may under the CWA. In Maryland, "virtually any activity which may impact the

wetland is regulated under its wetland protection statute." *Id.* (internal quotation omitted). In addition, several States enforce sizable buffer zones protecting their wetlands, including New York's 100-foot buffer and Maryland's 25- to 50-foot buffer. *Id.*

Further, State and local wetland regulation is more likely to devote scarce resources to the greatest environmental concerns. "Federal regulators, regardless of their intentions or regulatory authority, are inherently limited in their ability to regulate wetlands." *Id.* at 53. Although there are more then 100 million acres of wetlands in the contiguous United States, fewer than 1,200 full-time Corps of Engineers employees are tasked with wetland regulation – approximately 90,000 acres per employee. *Id.* at 52-53. State and local regulators are better able to provide their local communities with the certainty, predictability, and equity that they seek. Virtually every State and local government maps wetlands as part of its regulatory process yet no federal jurisdictional maps are available to allow landowners to determine conclusively whether or not their properties are wetlands subject to federal jurisdiction. *Id.* at 53.

Since this Court's decision in *SWANCC*, several options have been proposed to close any gaps left in the regulation of isolated wetlands, including the proposal of a model State wetland statute created by the Association of Wetland Managers. Ass'n of State Wetland Managers, *Model State Wetland Statute to Close the Gap Created by SWANCC* (2001), *available at* http://www.aswm.org/swp/model-leg.pdf. This model statute could easily be modified to include the type of nonnavigable, intrastate wetlands at issue in the case at bar. Further, States without comprehensive wetland statutes could look to several other States

for examples of effective legislation. Therefore, there will be little lag time between the determination that the federal government lacks jurisdiction over the lands at issue in this case and the reestablishment of State protection efforts.

In addition to State and federal regulatory programs, several nonregulatory programs are available to protect wetlands. Beginning in the 1980s, Congress created a new generation of wetland conservation programs: the North American Waterfowl Management Plan in 1986, the United States Fish and Wildlife Service's Partners for Fish and Wildlife program in 1987, and the Natural Resource Conservation Service's Wetland Reserve Program in 1990. *See, e.g.*, United States Fish & Wildlife Serv., *North American Waterfowl Management Plan* (1986), *available at* http://www.fws.gov/birdhabitat/NAWMP/images/NAWMP.pdf. These three programs have "restored an estimated 160,000-plus acres of wetlands per year from 1992 through 1996, at the relatively low cost of $1,000 per acre or less." Adler, *supra*, 22 Reg. at 16; Adler, *supra*, 29 Envtl. L. at 56. In contrast, the cost of CWA section 404 mitigation projects "can reach as high as $30,000 per acre, not including the legal and other costs borne by the permit applicant." Adler, *supra*, 22 Reg. at 16.

Furthermore, private conservation efforts have proven very effective in wetland protection. For example, Ducks Unlimited, a private conservation group, restored or enhanced more then 50,000 acres of wetlands in 1994 alone. Adler, *supra*, 29 Envtl. L. at 59. The overall effect of national environmental groups, such as the Nature Conservancy, and local or regional groups, such as the Chesapeake Wildlife Heritage, a group focusing on wetland restoration projects in the Chesapeake Bay area, taken in

conjunction with the federal and State nonregulatory programs undoubtedly results in far greater wetland conservation then CWA section 404 possibly could. All tolled, State programs, nonregulatory federal programs, and private conservation efforts are quite capable of filling any perceived gap left after federal section 404 enforcement over nonnavigable, intrastate wetlands is held to be unconstitutional.

III. THE FEDERAL AGENCIES' DEFINITION OF "WATERS OF THE UNITED STATES" TO INCLUDE NONNAVIGABLE, INTRASTATE WETLANDS IS AN UNREASONABLE INTERPRETATION OF THE CLEAN WATER ACT AND IS NOT ENTITLED TO DEFERENCE.

When the terms of a statute are clear, courts provide little room for agency interpretation of those terms; however, when Congress delegates authority to enforce a statute to a governmental agency, while leaving some ambiguity in how the agency is to enforce the statute, courts should assume that Congress impliedly delegated the authority to interpret the ambiguity to the agency charged with administering the statute. *Chevron*, 467 U.S. at 843-845. Unless the agency's interpretation of the statute is "arbitrary, unreasonable, or manifestly contrary to the statute," the agency interpretation should be applied. *Id.* at 843-844. However, this Court has refused to grant *Chevron* deference to agency interpretations that raise significant constitutional questions, such as whether Congress had the power to regulate the waters at issue here under the Commerce Clause. *SWANCC*, 531 U.S. at 681-683.

As a result of the Court's ruling in *SWANCC*, the Sixth Circuit's reliance on *Chevron* deference is misplaced. *Rapanos*, 376 F.3d at 640-641. In *SWANCC*, this Court was presented with the question of whether the Corps of Engineers' regulation interpreting section 404, the very regulation at issue here, properly extended federal jurisdiction to intrastate waters used as habitat by migratory birds. 531 U.S. 159. In rejecting the Corps' arguments, this Court found the terms of the CWA clear, and limited the scope of federal jurisdiction to navigable waters or open waters and those waters, including wetlands, immediately "adjacent to open water." *Id.* at 168. Though it considered the government's argument that federal jurisdiction extended further, this Court determined that the plain "text of the statute will not allow this." *Id.* at 167-174. In *SWANCC*, this Court also determined that the exercise of CWA jurisdiction over nonadjacent wetlands would raise "significant constitutional questions" under the Commerce Clause and that Congress would not be deemed to have pushed the outer limits of its authority without a "clear indication" that it intended to do so. *Id.* at 172-174. Finding no such indication and, in fact a contrary indication, this Court invalidated CWA jurisdiction over nonadjacent wetlands. *Id.* at 174.

Despite this Court's decision in *SWANCC*, the federal government continues to assert jurisdiction under the CWA over nonnavigable, intrastate wetlands such as Petitioners' properties. Although some federal courts have decided that *SWANCC* was a limited ruling and have affirmed federal regulation of any wetland with any "hydrological connection" to navigable water, no matter how distant or tenuous the connection, *e.g. Rapanos*, 376 F.3d 629 (6th Cir. 2004); *Treacy v. Newdunn Assocs., LLP*,

344 F.3d 407 (4th Cir. 2003); *United States v. Rueth Dev. Co.*, 334 F.3d 598 (7th Cir. 2003); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001), this Court's decision in *SWANCC* is clear: "In its decision, the Court . . . invalidates . . . the Corps' assertion of jurisdiction over all waters except for actually navigable waters, their tributaries, and wetlands adjacent to each." *Id.* at 176-177 (Stevens, J., dissenting). Therefore, because the Corps' interpretation of "waters of the United States" is contrary to this Court's precedent in *SWANCC*, *Chevron* deference by the Sixth Circuit was misplaced and Petitioners' properties should have been found to not be within the jurisdiction of the CWA.

IV. THE FEDERAL AGENCIES' INTERPRETATION AND THE SIXTH CIRCUIT'S RULINGS, EXTENDING CLEAN WATER ACT JURISDICTION TO NONNAVIGABLE, INTRASTATE WETLANDS WITH ANY HYDROLOGICAL CONNECTION TO NAVIGABLE WATERS, EXCEEDS CONGRESS'S POWER UNDER THE COMMERCE CLAUSE AND INTRUDES ON TRADITIONAL STATES' RIGHTS.

The Sixth Circuit, in upholding the federal government's regulation of nonnavigable, intrastate wetlands on the Petitioners' properties, has misinterpreted the jurisdictional limitations of the CWA. The current federal regulations provide a very broad definition of "waters of the United States," encompassing wetlands adjacent to other bodies of water (other than waters that are themselves wetlands). 33 C.F.R. § 328.3(a); 40 C.F.R. § 122.2. Moreover, federal regulations are far more explicit in defining "adjacent" as "bordering, contiguous, or neighboring," and

"adjacent wetlands" as "wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." 33 C.F.R. § 328.3(c). Yet, the Sixth Circuit concluded that nonnavigable, intrastate wetlands on the Petitioners' properties are subject to federal control under the CWA because of the presence of a "hydrological connection" establishing a "significant nexus between the wetlands and 'navigable waters.'" *Rapanos*, 376 F.3d at 639; *Carabell v. United States Army Corps of Eng'rs*, 391 F.3d 704, 710 (6th Cir. 2004). The Sixth Circuit reached this conclusion despite acknowledging that the "wetlands" on the Petitioners' properties are not physically adjacent to, or directly abutting, any navigable water. If the federal government may regulate all waters with a purported hydrological connection to any navigable water, no matter how tenuous or remote the connection, there is virtually no land that the federal government may not regulate, and the Commerce Clause has no meaning as a limitation on Congress's power.

The Sixth Circuit's holdings disregard totally this Court's Commerce Clause jurisprudence, and will, if allowed to stand, permit the federal government to use the CWA to regulate private property in every State with no constitutional limit. Moreover, this broadening of federal jurisdiction under the CWA does not just limit the rights of landowners, it encroaches upon the very rights of the States themselves to regulate lands within their borders. Land use planning, regulation, and zoning are not enumerated powers granted to the federal government. They are the basic, fundamental functions of local governmental entities. *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982) ("regulation of land use is perhaps the quintessential state

activity"). Authority over these functions is reserved, traditionally, to the States under the Tenth Amendment. *See, SWANCC*, 531 U.S. at 174 (recognizing the "States' traditional and primary power over land and water use"); *see also* 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water . . .").

In *United States v. Lopez*, this Court suggested that, whenever Congress attempts to regulate areas traditionally regulated by State or local governments, including the rights of private property owners, this Court will review that legislation with caution. 514 U.S. 549, 557-568 (1995). Foretelling the scrutiny it would apply, this Court rejected, in *Lopez*, the "costs of crime" and "national productivity" justifications for the Gun-Free School Zones Act ("GFSZA") proffered by Congress both because, had it accepted those justifications, it would be "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign," and because such a broad reading of the Commerce Clause would undermine the federal system of government. *Id.* at 561 n.3, 564, 567-568.

Likewise, in *SWANCC*, congressional authority under the Commerce Clause was tested. In *SWANCC*, this Court addressed whether EPA and the Corps could regulate isolated intrastate waters and wetlands that are not connected or adjacent to navigable waters "based on their actual or potential use as habitat for migratory birds." 531 U.S. at 163-164. This Court held that the migratory bird regulation was invalid because Congress did not intend to include "isolated" wetlands or waters within the term "navigable waters" when it enacted the CWA. *Id.* at 162-163.

Although the *SWANCC* decision did not decide whether federal regulation of nonnavigable, intrastate wetlands exceeded congressional authority under the Commerce Clause, this Court did suggest that the Corps' interpretation may have exceeded that authority. *Id.* at 172-173. This Court indicated that the Corps' regulation of isolated, intrastate wetlands would raise serious questions under the Commerce Clause because local land use regulation is a traditional State and local function. *Id.* at 172-174. Even though previous rulings had found that migratory bird protection was a "national interest of very nearly the first magnitude," this Court determined it was "not clear" whether the regulated activity or object, in the aggregate, affects interstate commerce. *Id.* at 173 (quoting *Missouri v. Holland*, 252 U.S. 416, 435 (1920)). Because there was no clear statement in the CWA that Congress intended to give the federal government authority over isolated wetlands, this Court refused to interpret the regulation to include "federal jurisdiction over ponds and mudflats falling with the 'Migratory Bird Rule' [that] would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174.

Because local land use and private property rights are necessarily intertwined, this Court's holdings in *Lopez* and *SWANCC* control in this matter. The Sixth Circuit's extension of federal jurisdiction under the CWA to nonnavigable, intrastate wetlands that do not abut navigable water substantially intrudes on the rights of the Petitioners, as private landowners, and on the sovereign power of the State to control local land use. Justice Kennedy, concurring in the *Lopez* decision, argued that courts should be hesitant to allow Congress to use the Commerce Clause as its basis for federal regulation in an "area of traditional state concern"

that "States lay claim [to] by right of history and expertise." *Lopez*, 514 U.S. at 580, 583 (Kennedy, J., concurring). Justice Kennedy elaborated that, with such an expansive definition of the Commerce Clause, "the boundaries between the spheres of federal and State authority would blur and political responsibility would become illusory." *Id.* at 577.

Accordingly, the Sixth Circuit's upholding of the federal government's regulation of nonnavigable, intrastate wetlands, such as the Petitioners' property, intrudes unconstitutionally on the rights of private landowners to use their land and the responsibilities of States to regulate local land use. The repercussions of such unbounded federal authority over "waters of the United States" are far-reaching and substantial.

CONCLUSION

For the foregoing reasons, Mountain States Legal Foundation respectfully requests that this Court overturn the decisions of the Sixth Circuit and hold that the jurisdiction of the Clean Water Act does not reach nonnavigable, intrastate wetlands such as Petitioners' properties.

Respectfully submitted,

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